

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

MISC. CIVIL APPLICATION NO. 28 OF 2022

(Originating from Civil Case No. 2 of 2021 of the High Court of Tanzania at Mbeya)

**THE REGISTERED BOARD OF TRUSTEES OF CHAMA CHA MAPINDUZI
T/A MBALIZI SECONDARY SCHOOLAPPLICANT
VERSUS**

**THE BOARD OF TRUSTEES OF
THE NATIONAL SOCIAL SECURITY FUND RESPONDENT**

RULING

Date of last order: 16th March, 2023

Date of ruling: 17th March, 2023

NGUNYALE, J.

This is a ruling in respect of an application for leave to defend a summary suit. The application has been made under the provisions of Order XXXV rule 2(2) of the Civil Procedure Code [Cap. 33 R: E 2019]. By a plaint the Board of Trustees of National Social Security Fund, the respondent herein, filed Civil Case No. 2 of 2021 under summary procedure against the Registered Board of Trustees of Chama Cha Mapinduzi t/a Mbalizi Secondary School craving for several reliefs. Upon being served with the plaint, the defendant, the applicant herein, filed the present application



supported by an affidavit of Amina Songoro Salim. The respondent did not file counter affidavit.

In the affidavit it is alleged that the plaintiff in the plaint claim the amount of Tsh. 487,947,098.65/= being the outstanding principal members' contributions plus the accumulated penalties. But in actual sense the applicant is indebted to the tune of Tsh. 332,528,560/=. There is further allegation that they had entered into oral agreement on how the amount will be paid to which the respondent herein has breached. She avers that the calculation of amount and penalties has been wrongly done making the amount claimed unmaintainable.

When the application came for hearing the applicant was represented by Caroline Mseja, learned Counsel whereas on part of the respondent Mr. Emmanuel Kamnkuru State Attorney entered appearance for the respondent. Mr. Kamnkuru had no objection to the application being granted.

I have considered the application, the only issue for my determination is whether it has merits. In the application of this nature, the court is not required to involve itself in lengthy arguments rather, to look upon the affidavit filed in support of the application to see whether the deposed facts have demonstrated a triable issue fit to go to trial. The applicant is only required to show a fair and reasonable defence. See **Makungu**



Investment Company Ltd vs Petrosol (T) Limited, Civil Appeal No.

23 of 2013, CAT at Arusha (Unreported) where the court held that;

'It is common ground that the underlying factor for grant of that leave is existence of triable issues, a matter of fact which has to be demonstrated by the applicant. The court's determination on whether or not there are triable issues has to be based on the affidavit, obviously because as of that stage, there is yet a statement of defence from the defendant.'

In the case of **Mohamed Enterprises (T) Ltd vs Biashara Consumers Services Ltd** [2002] TLR 149 which have been approved in several cases of the court of appeal like **Makungu Investment Company Ltd** case (supra) the court stated;

'In deciding whether a defendant should be granted leave to appear and defend a summary suit the role of the court is limited to looking at the affidavits filed by the defendant in order to decide whether there is any triable issue fit to go to trial.'

In this matter under para 4 of the affidavit the applicant has disclosed that the amount of Tsh. 487,945,098.65 which is claimed by the respondent in the plaint is in excess to the actual amount claimed that is Tsh. 332,528,560. In my view this is a triable issue as in the main suit the court will be required through evidence to be given to resolve on the actual amount the defendant owe to the plaintiff. Akin scenario was discussed in the case of **Prosper Paul Massawe & 2 Others vs Access**



Bank Tanzania Limited, Civil Appeal No. 39 of 20141, where the court stated;

'That, in our view, was an error for, even if the appellants did not dispute receiving the loan, the issue of seizure and sale of their goods, whether true or not, was only meant to suggest that the loan had been offset, be it partly or fully, which would constitute a triable issue.'

Although facts may not be the same but the principle extracted is applicable in this case because the court will be required to determine whether the defendant is liable for the outstanding of Tsh.487,945,098.65 claimed in the plaint or Tsh. 332,528,560 as suggested by the defendant.

Another issue is the presence of oral agreement between the parties on payment of the outstanding amount which the applicant alleges that it has been breached by the respondent. As observed earlier it was not denied by the respondent. It is my considered view that the applicant has managed to show good defence against the summary suit as all the facts deponed in the affidavit were not disputed for there was nothing countered. It is settled law that where a respondent does not dispute matters of fact made in an affidavit, there is no need to file a counter affidavit or affidavit in reply. see **Harith Rashid Shomvi vs Aziza Juma Zomboko**, Civil Application No. 496/01 of 2020 (Unreported). In this



matter there is no any point of law raised. Therefore, the facts in the affidavit represents the true facts of the case.

In the end, the application allowed, the applicant is hereby granted leave to appear and defend the summary suit in Civil Case No. 2 of 2021. Costs to abide to the outcome of the main suit.

DATED at MBEYA this 17th Day of March, 2023




D.P. Ngunyale
Judge

Ruling delivered this 17th day of March 2023 in presence of Ms. Calorine Mseja learned Counsel for the applicant and the respondent represented by Mr. Emmanuel Kamkuru learned State Attorney.


D.P. Ngunyale
Judge